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a divorce cause is a proceeding *in personam*, a doctrine held only by these courts. The third group,¹⁴ following the New Jersey theory based on the principle that a proceeding for divorce is *quasi in rem*, requires that the non-resident defendant be actually notified of the proceeding by mail, message or actual notice of service; depending on which is the best notice practicable. This theory appears to be the best in principle as well as the fairest to both parties.

It is such complicated decisions as the principal case, involving the different standpoints of the courts as to the extraterritorial effect of some divorces, that will inevitably result in a Uniform Divorce Law and thus settle the question in one certain and definite manner.

N. I. S. G.

LANDLORD AND TENANT—DUTY OWED BY LANDLORD TO TENANT—The owner of a building, leasing a part thereof and retaining possession of another part, is bound to exercise ordinary care to avoid injury to his tenant by the manner in which he uses the part retained by him.¹ This duty does not grow out of the relation of landlord and tenant, but is merely one aspect of an obligation, generally incumbent upon one in possession of property to employ reasonable care to so use it as not to injure the owner or possessor of neighboring property.² On this principle the owner of a three-story building was held liable in the recent case of *Moroder v. Fox*,³ where he, knowing that the second floor was vacant and unheated and that the water pipes supplying the third story were uncovered and unprotected from frost, allowed them to remain so during the winter time, when they froze and burst, permitting water to escape through the floor to the injury of the goods of the tenant underneath.

There is, however, a strong dissenting opinion by Timlin, J.,⁴ on the ground that the landlord owed no duty to the tenant, in anticipation of a freeze, to keep the vacant second floor apartment warm, or in any way to protect the pipes from frost; and since there was no duty imposed by law, there could be no breach of duty, conse-

¹⁴ *Felt v. Felt*, 59 N. J. E. 606 (1900); *Burlen v. Shannon*, 115 Mass. 438 (1873), and see Wharton, *Conflict of Laws*, §§236, 237.

¹ 3 Farnham, *Waters & Water Rights*, §966; *dictum* in *Buckley v. Cunningham*, 103 Ala. 449 (1893); *Jones v. Freidenburg*, 66 Ga. 505 (1881); *Glickauf v. Maurer*, 75 Ill. 289 (1874); *Railton v. Taylor*, 20 R. I. 279 (1897).

² *Krueger v. Ferrant*, 29 Minn. 385 (1882).

³ 143 N. W. Rep. 1040 (Wis. 1913).

⁴ Beginning page 1042.

quently there could be no actionable negligence.⁵ To arrive at this conclusion, Timlin, J., relied chiefly on *Buckley v. Cunningham*.⁶ But in that case the negligence alleged was the landlord's failure to turn off the water from the building in cold weather, and since the only stop cock for this purpose was outside the building and under the control of the city, it was quite as much within the power of the tenant as of the landlord to have the water turned off.⁷ It is submitted that had the negligence alleged in the complaint been the landlord's failure to use proper care in looking after the pipes, a different result would have been reached, conforming with the general law as expressed in the principal case.⁸

Upon the same principle, the upper tenant is liable for overflow from upper floor injuring the property of the tenant below.⁹ But since the gist of the action is negligence, when this is lacking no liability attaches to the upper tenant.¹⁰

⁵ *Gillis v. Penn. R. R. Co.*, 59 Pa. 129, 143 (1868); *B. & O. R. R. Co. v. Schwindling*, 101 Pa. 258, 261 (1882); *Goff v. Chippewa, etc., Co.*, 86 Wis. 237, 245 (1893).

⁶ *Supra*, note 1.

⁷ One injured by defects in appliances under the landlord's control cannot recover damages if he, himself, was guilty of negligence contributing to the injury. 3 *Shearman & Redfield, Negligence* (6th Ed.), §723; *Davis v. Pacific Power Co.*, 107 Cal. 563 (1895); *Gallager v. Button*, 73 Conn. 172 (1900); *Taylor v. Bailey*, 74 Ill. 178 (1874); *Huber v. Ryan*, 57 App. Div. 34, 37 (N. Y. 1901); *Brown v. Elliott*, 4 Daly, 329 (N. Y. 1872).

⁸ *Tiffany, Landlord & Tenant*, §§88, 91; *Pike v. Brittan*, 71 Cal. 159 (1886), stop cock negligently left open by landlord's janitor; *Hysore v. Quigley*, 9 Houst. 348 (Del. 1892); *Priest v. Nichols*, 116 Mass. 401 (1874); *Sheridan v. Forsee*, 106 Mo. App. 495 (1904); *Stapenhorst v. American Manufacturing Co.*, 36 N. Y. Super. Ct. 392 (1873), leakage of oil; *Levine v. Baldwin*, 87 App. Div. 150 (N. Y. 1903), overflow from pipes under landlord's control; *Rubenstein v. Hudson*, 86 N. Y. Suppl. 750 (1904), leaking water pipe; *Killion v. Power*, 51 Pa. 429 (1866); *Kecoughtan Lodge No. 29 v. Steiner*, 106 Va. 589 (1907), bursting of water pipe; *James Sheehan & Co. v. Barberis*, 41 Wash. 671 (1906).

⁹ 1 *Taylor, Landlord & Tenant* (9th Ed.), §175a; *White v. Montgomery*, 58 Ga. 204 (1877); *Rosenfield v. Arrol*, 44 Minn. 395 (1890); *Miller v. Benoit*, 29 App. Div. 252 (1898), affirmed in 164 N. Y. 590; *Greco v. Bernheimer*, 17 Misc. 592 (N. Y. 1896), in which case the fact of flooding the premises was held *prima facie* negligence.

¹⁰ *Smith on Negligence* (2nd Ed.), page 31, states the rule: "Where the tenant of an upper floor does not know of the defective state of his receptacle for water, and there is no negligence in his mode of dealing with it, and it overflows and injures the room of the tenant below, the doctrine of *Fletcher v. Rylands*, L. R. 3 H. L. 330 (Eng. 1868), does not apply, and he is not obliged to keep his pipes from overflowing in any event, but is only liable for negligence." *Moore v. Goedel*, 7 Bosw. 591 (N. Y. 1861); *Steinweg v. Biel*, 16 Misc. 47 (N. Y. 1896); *Lane v. Scagle*, 67 Vt. 281 (1894).

Since the landlord's liability is based on his right of control over the appliances, it follows that if he does not reserve control thereof, he is not liable for injuries from defects in same.¹¹ So the landlord is not liable for injuries to a tenant in a building caused by the improper use of appliances within the exclusive control of a tenant of another part of the building, for he does not insure against the negligence of his tenants;¹² although he might become liable therefor by express contract.¹³ Nor is he liable where the injuries result from defects in appliances on the premises leased by him to another, when these defects arise after the lease without his fault;¹⁴ but he is liable if the damage is caused by defects existing at the time of such lease.¹⁵

The question of the landlord's liability in the absence of negligence might arise in those jurisdictions which follow *Rylands v. Fletcher*.¹⁶ Yet the courts would probably deny the tenant relief on the ground that the introduction or collection of the water by the landlord was not for his own exclusive benefit, but was for the benefit of the building as a whole,¹⁷ or that the landlord may be regarded as a "natural user" of the part of the building retained by him within an exception which has apparently been established to

¹¹ 2 Underhill, Landlord & Tenant, §508; White & Co. v. Montgomery, *supra*; McKeon v. Cutter, 156 Mass. 296 (1892); Allen v. Smith, 76 Me. 335 (1884); Brick v. Favilla, 51 Misc. 550 (N. Y. 1906); Whitehead v. Comstock & Co., 25 R. I. 423 (1903).

¹² Jones, Landlord & Tenant, §616; Greene v. Hague, 10 Ill. App. 598 (1882), upper tenant allowing pipes to freeze; Mendel v. Fink, 8 Ill. App. 378 (1880); McCarthy v. York County Saving Bank, 74 Me. 315 (1883); Kenny v. Barns, 67 Mich. 336 (1887).

¹³ Dunn v. Robins, 20 N. Y. Suppl. 341 (1892).

¹⁴ Lebensburger v. Scofield, 155 Fed. Rep. 85 (1907); Haizlip v. Rozenberg, 63 Ark. 430 (1897); Leonard v. Gunther, 47 App. Div. 194 (N. Y. 1900).

¹⁵ Ingwersen v. Rankin, 47 N. J. L. 18 (1885); Citron v. Bayley, 36 App. Div. 130 (N. Y. 1899), in which it was said that "a landlord is clearly responsible for damages arising from negligent construction or defects due to his want of care existing at the time of his lease to a tenant."

¹⁶ *Supra*, note 10; and see particularly the opinion of Blackburn, J., in L. R. 1 Exch., at page 278 (1866).

¹⁷ Anderson v. Oppenheimer, L. R. 5 Q. B. D. 602 (Eng. 1880), where a pipe supplying the first floor with water from a tank at the top of a building burst and damaged a tenant's goods in the basement, the landlord was held not liable, because the water was brought on the premises partly for the tenant's benefit; Blake & Co. v. Woolf, L. R. 2 Q. B. D. 426 (Eng. 1898); McCord Rubber Co. v. St. Joseph Water Co., 181 Mo. 678, 694 (1904); Langabaugh v. Anderson, 68 Ohio St. 131 (1903), escape of oil from tank.

the rule of absolute liability.¹⁸ It now seems well settled that the tenant has no remedy against the landlord in the absence of negligence.¹⁹

W. G. S.

WILLS—CONDITIONAL LIMITATIONS—RESTRAINT OF MARRIAGE—Several interesting points were raised in the construction of a will in a Maryland case.¹ A devise of land was made to the niece of the testator "so long as she may remain single and unmarried, and, in case of her marriage, from and after that time I give and devise all of my said property to my nephew, Turner Asby Maddox, and to his heirs, absolutely forever." The niece conveyed all her right, title and interest in the estate to the appellee and subsequently died unmarried. The appellee claimed the property as his own, asserting a fee-simple title thereto, but complained that he could not sell or fully enjoy the same because the appellant, Turner Asby Maddox, claims that under the will the title to the property is vested in him in fee simple and that the appellee's grantor took only a life estate subject to a conditional limitation in case she married. It was held that there was a life estate in the niece with a limitation over in fee, in case of marriage or death, to the appellant, Turner Asby Maddox.

The questions raised by this case are: (1) Was this a conditional limitation or a condition subsequent? (2) Was the condition in restraint of marriage? (3) Did the niece take the entire estate absolutely and in fee, subject to be divested only if she married, or did she only take a life estate determinable on her marriage? (4) If she took only a life estate, and since the will is silent as to the disposition of the remainder in the event of her dying unmarried, did the testator die intestate as to this remainder or did it vest in Turner Asby Maddox?

A condition subsequent must be carefully distinguished from a limitation, for if a limitation the estate terminates by force of the limitation alone, while in the case of a condition the estate does not terminate upon its breach, unless an entry or claim is made by the person entitled to take advantage of the condition.² Upon the

¹⁸ Pollock on Torts (9th Ed.), Chap. XII, pages 501, 507; *Wilson v. Waddell*, 2 A. C. 95 (Eng. 1876).

¹⁹ Foa, *Landlord & Tenant* (3rd Ed.), p. 134; Cooley, *Torts* (2nd Ed.), p. 570; *Anderson v. Oppenheimer*, *supra*; *Carstairs v. Taylor*, L. R. 6 Exch. 217 (Eng. 1871).

¹ *Maddox v. Yoe*, 88 Atl. Rep. 225 (Md. 1913).

² Co. Litt. 214b; 2 Bl. Comm. 155.